THE ESTABLISHMENT OF JUDICIAL REVIEW.*

I.

WHEN Gladstone described the Constitution of the United States as "the most wonderful work ever struck off at a given time by the brain and purpose of man," his amiable intention to flatter was forgotten, while what was considered his gross historical error became at once a theme of adverse criticism. Their contemporaries and immediate posterity regarded the work of the Constitutional Fathers as the inspired product of political genius and essentially as a creation out of hand. Subsequently, due partly to the influence of the disciples of Savigny in the field of legal history, partly to the sway of the doctrine of evolution, and partly to a patriotic desire to claim for the Constitution a conformity to the historic spirit and needs of the American people like to that claimed for the English Constitution by English writers, and so inferentially, similar elements of durability, it has become the custom of writers to represent the Constitution as preëminently a deposit of time and event and to accord to the Fathers the substantial but more modest merit of having merely ratified the outcome of habit and usage. This point of view, I am persuaded, has a large admixture of error and the other a correspondingly large element of truth. Because they were not utopists, because they had experienced some disillusionment from their earlier attempts at constitution-making, because they had some conception of the limits set by possibility, all this affords no adequate proof that the Fathers were not of their time and did not participate largely in its way of thinking. "The collected wisdom acquired from a long succession of years is laid open for our use in the establishment of our forms of government," wrote Washington in 1783.[1] Here exactly is the attitude of eighteenth century rationalism: its confidence in the reasoned and sifted results of human experience; its belief in the efficacy of ideas for the remedying of institutions, its firm persuasion more particularly of the existence of an available political science and of its mastery of that science,—such was the point of view of the latter quarter of the eighteenth century—the greatest era of reform in government that modern history has seen—such was the point of view of the

* This article is Chapter IV of the writer's work now in preparation on "The Growth of Judicial Review."

[1] Still better, see Hamilton, Federalist No. 9; also Adams, Defense of the Constitutions, Life and Works, IV, pp. 283, 290, 292, 579. Adams is writing of the State Constitutions, but his point of view was applicable to the U. S. Constitution.

Constitutional Fathers. They believed that the human reason can often intervene successfully to arrest the current of unreflective event and divert it to provided channels. They drew no fallacious line between the "organic" and the "artificial," for their thinking admitted no such categories. Readers of Plutarch, they were confident of their ability to emulate the achievements of Lycurgus and Solon and leave a nation blessed with a polity accordant with its fundamental spirit and abiding necessities, a polity moreover which would be superior to all existing polities in that it would be founded upon nature and reason and not upon force or chance.[2] But this being the point of view of the Fathers, it necessarily results that their indebtedness to the past was for ideas rather than for institutions. Whenever therefore they borrow from the past any of the really distinctive features of our constitutional system, for example Federalism, checks and balances, judicial review, they will be found to have taken them, not in the form of institutions tested and hammered into shape by practice, but as raw ideas.

The case of judicial review furnishes a particularly good example of the issue between those who, like myself, would insist upon the rationalistic background of American constitutional history and those who would insist upon its institutional background. The exponents of the latter view, pointing out the fact that the colonial legislatures were sometimes in origin merely the directorates of trading companies whose faculties were defined and limited by their charters, attribute to that fact the origin of the American idea of legislative power as limited; and they often adduce in this connection the case of *Winthrop* v. *Lechmere,* in which the British Privy Council, in 1728, disallowed a Connecticut enactment on the ground that it transgressed the terms of the Colonial charter. The difficulty with this view is, that its advocates feel under no necessity of showing that those who are supposed to have succumbed to the alleged influence knew anything of it. *Winthrop* v. *Lechmere,* for instance,—entirely aside from the fact that the Privy Council viewed its action in annulling the Connecticut enactment as legislative rather than judicial,—was totally unknown to those who brought about judicial review. And the main proposition rests upon similar ground. It is true that our revolutionary forefathers regarded legislative power as limited; but the legislature they were particularly discussing was Parliament. But, it is urged, that is the very point. The Americans were applying ideas derived from their experience

[2] See Adams, IV, 292 footnote; also Melanchton Smith in Ford's Pamphlets on the Constitution, p. 109; also MacIntosh, French Revolution, p. 115; see also Dickinson on Experience and Reason, in Madison's Notes of the Convention, Aug. 13.

as colonists to the imperial legislature, forgetful or unconscious of the limitation that their source imposed upon the availability of such ideas. There is one circumstance that is fatal to this contention, namely, that the whig advocates of the American cause in Parliament itself, including in their number the greatest lawyer of the times, Lord CAMDEN, urged the same idea of Parliament's power as limited. Where then did these men get it from? The truth of the matter is, that all the literary evidence goes to establish the idea of legislative power as limited upon a foundation entirely independent of American colonial history, upon the foundation, to-wit, of the idea of *fundamental law*. This idea reaches back far beyond Magna Charta; it furnishes the basis of Parliament's argument against the pretensions of the Stuarts, and Locke's justification of the Glorious Revolution of 1688. It is still strong in England, even at the moment the passage of the Declaratory Act gave expression to the antagonistic but relatively modern idea of Parliament's power as unlimited.[3]

The literary evidence with reference to the basis of judicial review is equally definite. All the law and doctrine upon that topic goes back finally to Coke's famous dictum in *Dr. Bonham's* case:[4] "And it appears in our books, that in many cases, the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, * * * the Common Law will control it, and adjudge such Act to be void." Coke proceeds to cite examples and precedents to confirm his utterance, and recent investigation shows that his use of these was well justified.[5] But, it is a more noteworthy fact still that reiterations of the dictum by Coke's successors on the bench, and by commentators, had given to it, by the middle of the eighteenth century, all of the character of established law. Thus Lord Hobart, some years after, wrote as follows:[6] "Even an Act of Parliament made against natural equity * * * is void in itself"; and a quarter century later Lord Holt is reported as saying,[7] "What my Lord Coke says in *Dr. Bonham's* case * * * is

[3] For a statement of the view combatted in the text, see Brooks Adams, Atlantic Monthly, LIV, 610 ffg.; also Charles Borgrand, The Rise of Modern Democracy (London, 1894). On Winthrop v. Lechmere, see J. B. Thayer, Cases on Constitutional Law, I, 34-9; also Brinton Coxe, Judicial Power and Unconstitutional Legislation, pp. 211-13 and pp. 370-82. On the subject of fundamental law, see Chapter II above; also C. H. McIlwain, The High Court of Parliament and Its Supremacy (Yale Univ. Press, 1910), Ch. II, and references.

[4] 8 Coke 107, 118.

[5] McIlwain, Ch. IV.

[6] Day v. Savage, Hobart 85[a].

[7] City of London v. Wood, 12 Modern Reports 687.

far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and judge * * * it would be a void Act of Parliament." The law thus laid down finds statement in Bacon's Abridgment, first published in 1735; in Viner's Abridgment, published 1741-51, from which Otis later quoted; and in Comyn's Digest, 1762-67, but written some twenty years earlier.[8]

"Coke Lyttleton" wrote Jefferson many years later with reference to the period preceding the Revolution, "was then the universal law book of students and a sounder Whig never wrote, nor one of profounder learning in the orthodox doctrines of the British constitution or what is called British rights." Coke's perceptible influence in the colonies, however, goes back to a much earlier period, and we read that in 1688 "the men of Massachusetts did much quote Lord Coke." Earlier still in the case of *Giddings* v. *Brown*,[9] COKE'S dictum received practical application,—which it never did in England—though the act overturned was merely a town meeting vote. A Massachusetts town had voted its minister a dwelling and with that end in view had imposed a tax, for his refusal to pay which plaintiff had had his goods distrained. Magistrate Symonds based his judgment for plaintiff upon the following grounds: "The fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against fundamental law, is therefore void, and the taking was not justifiable." This decision is interesting not only as the earliest hint of judicial review in America, but also as affording the earliest statement that I at any rate have seen, of the proverb which may be regarded as the "folk-origin", so to speak, of American constitutional law, that "the property of A cannot be given to B without A's consent." Writing in 1759, Cadwalader Colden[10] makes casual reference to a "judicial power of declaring them [laws] void." This does not prove however, I think, that there actually was anything like judicial review in the American colonies; the reference is almost certainly to Coke's dictum.

The oepning event in American constitutional history is James Otis' argument in the *Writs of Assistance* case at Boston in Feb-

[8] Quincy, Early Massachusetts Reports, Note to Paxton's Case, pp. 520 ff.; to be found also in Thayer, .I 48 ff.; see also Blackstone, I Coms. 91.

[9] Reinsch, Colonial Common Law: Select Essays in Anglo-American Legal History, Vol I, p. 376.

[10] N. Y. Hist'l Society Cols., II, 204. See also Chalmers, Political Annals: Same Cols., I, 81. See also Chalmers, Colonial Opinions, pp. 373-82.

ruary, 1761. "Then and there," wrote John Adams, long afterwards, the child Independence was born." He might well have added, that then and there American constitutional theory was born. The question at issue was whether the British customs officials, one Paxton in particular, should be furnished with general search warrants enabling them to search for smuggled goods. The application was opposed for the Boston merchants by Thacher and Otis. Thacher contented himself with denying that such a writ as was asked for was warranted by any act of Parliament and, more particularly, that the court to whom the application had been made had authority in the premises. Otis, on the other hand, plunged at once into the most fundamental issues.[11] His argument was essentially this, that whether such writs were warranted by act of Parliament or not, was a matter of indifference, since such act of Parliament would be "against the Constitution" and "against natural equity" and therefore void. "If an act of Parliament should be made in the very words of this petition, it would be void. The executive courts must pass such acts into disuse."[12] The great importance of Otis' argument is that it brought Coke's dictum forward at a moment when it was sure to draw to itself wide-spread popular attention. In 1765, Gov. Hutchinson, referring to the opposition to the Stamp Act, wrote as follows: "The prevailing reason at this time is that the act of Parliament is against Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void." Otis repeated his argument more than once, as did also his reporter, John Adams. As late as 1776, at the outbreak of war, Justice Cushing charged a Massachusetts jury to ignore certain acts of Parliament as void and inoperative and was congratulated by Adams for so doing.[13]

Meantime, the doctrine of Otis' argument had spread abroad and had been extended to other issues. I have in mind particularly George Mason's argument in the case of *Robin* v. *Hardaway*,[14] which arose in Virginia in 1772 and was reported by Thomas Jefferson. The plaintiffs in this action, Mason's clients, were descendants of Indian women who had been brought into Virginia at various times by traders and sold as slaves under an act of assembly

[11] Adams, Life and Works, II, 521-5.

[12] Note the term, "executive courts." In connection with the doctrine that the courts might declare an act of Parliament void, it is important to recall that the royal dispensing power, while acknowledged to extend to statutes, stopped short at the common law. The old distinction between mala in se and mala prohibita is also important in the same connection. McInwain, pp. 310 ffg.

[13] See Note 7, above.

[14] Jefferson (Va.) 109.

passed in 1682. Mason developed his argument under four headings, the first of which comprised the thesis that the act "was originally void itself, because it was contrary to natural right." "If natural right, independence, defective representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles," Mason inquired, "can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. Now all acts of the legislature apparently contrary to natural right and justice are, in our laws, and must be, in the nature of things, considered as void. The laws of Nature are the laws of God; whose authority can be superseded by no power on earth. * * * All human constitutions which contradict their law, we are in conscience bound to disobey. Such have been adjudications of our courts of justice." Mason concludes by citing Coke and Hobart. The court adjudged the act of 1682 repealed.

But Coke's dictum supplies only the original basis of the doctrine of judicial review; its later basis is supplied by the written constitution.[15] The argument for judicial review within the written constitution as stated by Hamilton in the Federalist No. 78, less satisfactorily by Marshall in *Marbury* v. *Madison,*[16] and by the Virginia judges at great length in *Kamper* v. *Hawkins*[17] rests upon the following propositions: first, that the constitution emanates from the people and is fundamental; secondly, that a legislative enactment emanates from mere agents of the people; thirdly, that the constitution is a law and as such is enforceable by the courts. The historical evaluation of such an argument is a matter of difficulty, since it compels an endeavor to draw with precision the line between the contemporary meaning of the terms used and their meaning as used in the argument. This difficulty inheres, of course, in any attempt to give an historical account of institutions. For, as Bagehot puts it, "Language is the tradition of nations; each generation describes what it sees but it uses words transmitted from the past." But in a case like that before us the difficulty is even greater, for it is this very capacity of words to take on new meanings without alteration of form that constitutes the appeal of the argument we are called upon to deal with.

[15] See Morey, Am. Academy of Social and Political Science, IX, 398 ffg; also Davis, J. H. Univ. Studies, 32d series, pp. 473 ffg; F. N. Thorpe, Am. Charters, Constitutions, and Organic Laws, especially the first Virginia Bill of Rights and Ensuing Constitution, VII. 3812 ff.

[16] 1 Cranch. 137.

[17] 1 Va. Cas. 20.

It is undoubtedly true that from the outset the constitution was regarded as fundamental, and also as emanating in some sort from the sovereign people, but the two ideas did not then stand in the same relation of effect and cause that they do today. The constitution was regarded as fundamental, but like the British constitution, on account of its content rather than its source. Also it was regarded as emanating from the people, but from the sovereign people in extraordinary and revolutionary assemblage, casting off all existing political ties and creating society anew. But that society once set agoing, where then were the sovereign people, save on election days, if not in the legislature, which in these early State constitutions *was practically omnipotent?* Nor did this assumption involve the notion necessarily that the legislature could change the constitution. As the Massachusetts Circular Letter[18] had asserted with reference to Parliament under the British Constitution, it was indeed sovereign but only upon the basis of the constitution that made it so, wherefor it could not alter that constitution "without destroying the basis of its own existence." Of course, it would have been quite logical, on the basis of Coke's dictum, for judicial review to have been retained as one way of keeping legislative power within the now written constitution, but the evidence is that it was for the time being dropped, the point of view of the revolutionary state constitutions being exactly that the legislative power, with its direct accountability to the people, was the securest possible defense of the constitution and of the rights secured therein. And should a breach of the constitution occur, there were still the ballot-box, the right of petition, a Council of Censors perhaps, and ultimately that very ancient right, going back to Magna Charta itself, the right of revolution.

But it was also urged, that the legislature comprises only the representatives of the people and that their acts are therefore only the acts of the agents of the people, while the constitution is the act of the sovereign people themselves. To this statement two observations are pertinent. In the first place, as we have seen, the original sovereign people had passed out of existence, save as a highly artificial concept, little able to hold its own along side the palpable substantiality of the legislature; and although the constitutional convention was gradually coming into use as a part of constitutional machinery to lend this artificial concept reality once more, it was, previous to the establishment of judicial review, itself only in the

[18] MacDonald, Documentary Source Book, p. 148. The endebtedness of the phraseology of this document to Vattel is evident: see above, Ch. II.

process of establishment and therefore hardly a fact to base an argument upon very securely.[18a] But in the second place, if the legislature was only representative of the people and not the people themselves, legally speaking, how of the courts? Hamilton's argument upon this point is as follows: "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption where it is not to be collected from any particular provisions in the constitution. * * * It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority." But *was* it more rational in 1787 to suppose this? It is hardly necessary to say that this was not the point of view embodied in the early state constitutions, whether considered as to their "particular provisions" or in their entirety.

But the advocate of judicial review went on to contend, that the interpretation of the law was the exclusive function of the court and that the constitution was law. But again he assumed the existence of unwonted distinctions and attributed to words a definiteness of meaning that had not hitherto belonged to them. One of the principal objections raised against the early state constitutions from 1780 on was that, contrary to Montesquieu's maxim, all the powers of government were available to the legislature.[19] But that being the case, suppose it granted that the judiciary might on occasion interpret the constitution, yet that fact would not have operated to withdraw the final interpretation from the legislature, which repeatedly set aside judicial interpretations of the ordinary statutes. But furthermore, *was* direct interpretation of the constitution a judicial function at all? It is upon this point that most of the argument between the advocate and opponent of judicial review occurred. The advocate argued, that it was, because the constitution was the law, that is, law in the strict sense of a body or source of rules enforceable by the courts. The argument turns out, upon inspection, to be a mere begging of the question, a proposition identical with the one

[18a] As to the novelty of the Constitutional Convention in 1789, see Ellsworth's testimony in Madison's Notes, July 23. On this and allied topics, see an excellent article by W. F. Dodd in the Am. Pol. Sc. Rev., II, 545-61. As to the early identification of the Constitution with a social compact, emanating from a society which had been dissolved by revolution into its constituent elements, see particularly the opinions of the judges in Kamper v. Hawkins, above.

[19] See particularly Jefferson, Notes on Virginia: Writings (Memorial Edition) II, 160-78.

to be established.[20] For if it was an item of judicial power to interpret the constitution without legislative intervention, then the constitution was a body of rules directly enforceable by the courts; and if the constitution was such a body of rules, then to interpret them, whether finally or not, was a judicial function. The fact of the matter is, that the establishment of judicial review gave the constitution the character of law, though there was still long discussion as to what portions of it the courts could take cognizance of ere the legislature had acted upon them and put them into operation; and the fact also is that the establishment of judicial review marked a step in the establishment of the distinction between the people, organized in constitutional convention, as the supreme legislative power, and the ordinary legislature as a popular agency merely and therefore subordinate; and finally it marked a similar step with reference to legislative power and judicial power; but none of these subsequent developments, it is evident, was fairly available as a premise of the argument from which, in point of historical fact, they are all deductions. On the other hand, I would not have the fact that unhistorical assumptions underlay the argument for judicial review within the written constitution misinterpreted; for exactly the same thing was true of the counter-argument. The truth is that, when the issue over judicial review was first joined, there were a number of notions on hand which were comparatively undefined and which consequently each side was more or less free to define to suit itself. It was for time alone to determine which side's definitions were to survive to become incorporated in institutions.

The first authenticated case, and indeed the only one anterior to the Constitutional Convention in 1787, in which a court ventured to refuse enforcement to a legislative enactment on the ground that it conflicted with the provisions of the written constitution is that of *Holmes* v. *Walton*,[21] which was argued before the Supreme Court of New Jersey, November, 1779. The New Jersey Legislature had the year previous passed a statute, with the purpose of preventing trade with the enemy, which authorized the seizure of all goods in

[20] Art. VI of the Constitution, to which Hamilton makes slanting reference, makes the Constitution supreme law only for the State judges. See below.

[21] See article by Austin Scott in Am. Hist. (1 Rev.: Vol. IV, pp. 456169.) See also article by Professor Trent in same review Vol. I, pp. 444 ff, with reference to the case of Josiah Phillips. Prof. Trent's attempt to establish the importance of this case fails. Compare Elliot's Debates, Vol. III, pp. 66-7, 140; 298-9. Slavery was in effect abolished in Massachusetts by Judicial decisions in assault and battery actions and the like; in the course of the years 1781 to 1793. These decisions, however, were based upon the assumption that the laws authorizing the servile detentions had been repealed by the Constitution of 1780. See G. H. Moore, Notes on the History of Slavery in Mass. (N. Y. 1866), pp. 200-23.

transit to or from the British lines and provided that all actions resulting from such seizures should be tried before a jury of six men. Section 22 however of the Constitution of 1776 stipulated "* * * that the inestimable right of trial by jury shall remain confirmed as part of the law of this colony without repeal forever." It is interesting to note as evidence that the idea of judicial review had not occurred to those who drafted the New Jersey Constitution three years before, the fact that they relied for the preservation of this, —as they evidently esteemed it—most fundamental provision of the constitution upon the good faith of the legislature, it being required by the final section of the constitution that every member of that body should take an oath not to assent to any law, vote, or proceeding, to repeal or annul "that part of the twenty-second section respecting the trial by jury." But now, *had* the legislature repealed this section by providing a jury of six in lieu of the old Common Law jury of twelve; and if it had, was the court authorized to refuse to enforce the objectionable statute? These were the questions before the court, questions which it took ten months—two terms—to ponder over before answering. Ultimately though, on September 7, 1780, the court ordered judgment for the plaintiff. Unfortunately the opinions rendered by the judges have been lost, but all things considered, it seems highly probable that a petition presented a few weeks later to the House of Assembly from "sixty inhabitants of the county of Monmouth," and complaining that the justices of the supreme court have set aside some of the laws as unconstitutional and made void the proceedings of the magistrates, though strictly agreeable to the said laws, to the encouragement of the disaffected and great loss to the loyal citizens of the State, and praying redress," stated the grounds of the decision accurately. Moreover that the judges would nullify the statute seems to have been prevised some months before the court ventured to make its decision public. For on the very day following the argument of the case, November 12, 1779, a member of the council "obtained leave to bring in a bill amending the "'Seizure Act'." To this attempt at amendment the assembly at first offered strong opposition, but ultimately a compromise measure was passed, not requiring, but only empowering, the court of first instance to grant a jury of twelve men. From the standpoint of the necessities of the case, the judges must be deemed to have acted with a good deal of pedantry in *Holmes* v. *Walton,* and from the standpoint of present day constitutional law the assembly, rather than they, was right in its construction of the constitution. The case is none the less an historical landmark, though how far its contemporary fame spread is very un-

certain. Five years later Gouverneur Morris, in an address to the Pennsylvania Legislature, the aim of which was to dissuade that body from repealing the charter of the National Bank, wrote thus, with palpable reference to this case:[22] "A law was once passed in New Jersey which the judges pronounced unconstitutional and therefore void. Surely no good citizen can wish to see this point decided in the tribunals of Pennsylvania. Such power in judges is dangerous; but unless it somewhere exists, the time employed in framing a bill of rights or form of government is merely thrown away." On the other hand we have certain evidence that *Holmes* v. *Walton* was unknown in Rhode Island, as late as 1786.[23]

Between the years 1780 and 1786 the idea of judicial review within the written constitution was broached before a judicial tribunal only once, namely, in the case of *Commonwealth* v. *Caton*,[24] which was decided by the Virginia Court of Appeals in November, 1782. The act in question was the so-called Treason Act of 1776. Randolph, attorney general, argued for the commonwealth that whether "the act of assembly pursued the spirit of the constitution" or not, "the court was not authorized to declare it void." The act was upheld but the judges were generally of the opinion that if they had found it to be in conflict with the constitution they would have had power to pronounce it void. "If the whole legislature" declared the learned Wythe, with characteristic vehemence, "if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat at this tribunal, and pointing to the constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further." Pendleton was not so sure: "It has been very properly said," he observed, "* * * that this act declaring the rights of the citizens and forming their government * * * must be considered as a rule obligatory upon every department, not to be departed from on any occasion. But how far the court, in whom the judiciary power may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its form by the legislative power, *without exercising the power of that branch contrary to the plain terms of the constitution,* is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas."[25]

[22] Sparks, Gouverneur Morris, III, 438.

[23] See Trevett v. Weeden, below. Varnum, in his argument in that case did not mention Holmes v. Walton. It is a case where the argument from silence is conclusive.

[24] 4 Call (Va.) 5.

[25] The italics are my own.

The thing that effectively forced general attention to the suggestion of judicial review, as a retarding agency in our constitutional system, was the financial legislation put forth by some of the states in the years 1785 and 1786, considered in connection with which therefore the case of *Trevett* v. *Weeden*[26] becomes perhaps, though no statute was overturned by it, of greater actual importance in the history of judicial review than *Holmes* v. *Walton,* above. The case arose in Rhode Island in 1786, under an act of the legislature denouncing a penalty of £100 against any one who should refuse paper money at its face value in exchange for commodities, and creating a special court of three judges for the trial of complaints against recalcitrant creditors. Weeden, a butcher, fell under the condemnation of the act by having refused a tender of currency by plaintiff for some meat. The latter at once proceeded to action under the statute, but the case, through some inadvertence, was brought, not before the special court of three judges, but before the supreme court. Weeden's counsel Varnum proceeded therefore to base his client's case in part upon the contention that the court did not have jurisdiction, but his main argument, which he elaborated at great length, was that the statute was unconstitutional and void. Trial by jury, he argued, had been secured to every Englishman by Magna Charta and had been established in Rhode Island by the provisions of the charter according the inhabitants all the "liberties * * * of free and natural subjects * * * as if they * * * were born within the realm of England." Of course Rhode Island was now independent, but that did not affect the matter since the colonial charter had become the constitution of the state, which the legislature could not alter "without destroying the basis of their existence." But who in the particular instance was to decide whether the legislature had altered the constitution or not? "Have the judges a power to repeal, to amend, to alter laws, or to make new law?" "God forbid! In that case they would become legislators." "But the judiciary have the sole power of judging of laws * * * and cannot admit any act of the legislature as law which is against the constitution." The judges, though strongly sympathizing with Varnum's argument upon the constitutional point, dismissed the action upon the point of jurisdiction. They did not however by their caution escape censure, for they were promptly cited be-

[26] On Trevett v. Weeden, see Varnum's Pamphlet: Providence, 1787; Thayer, I, 73-78; Coxe, pp. 234-48; McMaster, History of the People of the U. S., I, 337-9. McMaster shows that in contemporary opinion, Trevett v. Weeden was regarded as a genuine case of judicial review. For a reference to Trevett v. Weeden in the Convention of 1787, see Madison's Notes, July 17.

fore the assembly to assign the reasons for their judgment, the tendency of which, it was declared, was "to abolish the legislative authority." The judges pleaded their innocence in the particular case, though some of them were candid enough to reveal their true sentiments, in consequence of which three of them failed of re-appointment the following year. *Trevett* v. *Weeden* was often alluded to in the Constitutional Convention and the illustration it afforded of the feebleness of the State judiciaries in the face of legislative hostility furnished the strongest argument for the provision eventually made for appeal in constitutional cases from state courts to the United States Supreme Court.

But *Trevett* v. *Weeden* is important in another connection also: it is a transitional case. Ostensibly Varnum bases his argument upon the Rhode Island charter, which he pretends to treat as the written constitution of the State, but actually, in order to bring the document to bear upon the matter he is arguing, he goes far afield into the history of "British liberties," resorting to both Coke and Locke, to supply it the desired content. In form, his argument is, in main, an argument for judicial review under the written constitution, but in effect, it is an argument for judicial review upon the basis of such portion of the *fundamental law* as the court may deem to have found recognition in the written constitution. And indeed, Coke's dictum was still very much alive. In the *Symsbury Case,*[27] which arose in 1784, in Connecticut,—which interestingly enough also still retained its colonial charter with slight modification,—we have a genuine case of judicial review of the earlier type, a later grant of land by the legislature being set aside in the interest of an earlier similar grant of the same parcel, upon the ground that "the act of the general assembly * * * could not legally operate to curtail the land before granted." An interesting side light is thrown upon this decision by a remark of Ellsworth in the Constitutional Convention. "Mr. Ellsworth," Madison records, "contended that there was no lawyer, no civilian, who would not say, that *ex post facto* laws were of themselves void. It cannot, then be necessary to prohibit them."[28] Since Ellsworth haled from Connecticut, we may well believe that he had the decision in the *Symsbury* case in mind.

Furthermore, Coke's dictum found reinforcement about this time from a new source. America was now an independent state or a group of independent states, the responsibility of which under the Law of Nations must be ascertained and maintained. The Law

[27] Kirby (Conn.) 444-7.
[28] Madison's Notes, August 22nd.

of Nations however, at this epoch, rested largely upon the Law of Nature. The study of the Law of Nations therefore conduced not only to fortify earlier researches into the Law of Nature but conversely to call attention to the Law of Nations, the legally binding character of which was admitted by courts of the eighteenth century quite universally, as itself a possible limitation upon legislative enactments. On the other hand, however, a counter influence was also coming into play at the same time. Blackstone, with his theory of legislative sovereignty, was gradually superseding Coke as the universal textbook, with the result that the former's description of Parliament was coming to be applied to the State legislatures. The first clash between the new and the old ideas occurs in *Rutgers* v. *Waddington,*[29] the date of which is 1783.

The case was an action of trespass brought by plaintiff under the so-called Trespass Act against defendant, for his occupancy of plaintiff's premises during the late British possession of New York City. The act provided that no defendant in such action should be admitted "to plead in justification any military order or command whatever of the enemy for such occupancy," etc. Defendant's counsel, Alexander Hamilton, and others, adducing the old rule of International Law vesting in the conqueror (that is, in this case, the British Commander in New York City), the disposal of the rents and profits of the enemy's real property, denied the right of any particular state or nation so to alter or annul any portion of the Law of Nations as to deprive a foreigner from appealing to it in the courts of that country. The court in its opinion in favor of plaintiff asserts the supremacy of the legislature in the strongest terms but at the same time manages to evade the operation of the statute in this particular case. "The supremacy of the legislature," runs the court's opinion, "need not be called into question; if they think *positively* to enact a law, there is no power which can control them. When the main object of such a law is clearly expressed and the intention manifest, the judges are not at liberty, although it appears to them *unreasonable,* to reject it; for this were to set the *judicial* above the *legislative* which would be subversive of all government"—all of which, of course, is straight from Blackstone. "But," the court continues, "when a law is expressed in *general words* and some *collateral matter* which happens to arise from those general words is *unreasonable,* then the judges are in decency to conclude that the consequences were not foreseen by the legislature, and therefore they are at liberty to expound the statute by *equity*

[29] Rutgers v. Waddington, Pamphlet, edited by H. B. Dawson, 1866; see also Thayer I, 63-72; and Coxe, pp. 223-33.

and only *quoad hoc* to disregard it." As may be surmised, this rather disingenious performance called forth protests. Among other things, it was pointed out that the Law of Nations was the same when the statute was passed as at the time of the action, and that therefore the contention that the legislature did not intend the consequences of its act was scarcely sustainable by candid reasoning. The main emphasis of the protestants however was upon the very issue which the court had endeavored to avoid raising: "That there should be a power vested in courts of judicature whereby they might control the supreme legislative power we think is absurd in itself. Such power in courts would be destructive of liberty and remove all security of property. The design of courts of justice, in our government, from the very nature of their institution, is to *declare* laws, not to *alter* them. Whenever they depart from this design of their institution they confound legislative and judicial powers." Practically too, the decision in *Rutgers* v. *Waddington* proved abortive. "Accordingly," says Hamilton, "many suits were brought and many judgments given * * * and many compromises were made, and large sums paid, under the despair of a successful defense."[30]

In one way however, owing to the fact that it had been partly argued upon the basis of the Treaty of 1783, *Rutgers* v. *Waddington* was of immense importance. On Feb. 23, 1787, Jefferson wrote John Adams from Paris criticizing the latter for speaking of Congress as a "Diplomatic Assembly" merely. "Separating into parts," Jefferson argues,[31] "the whole sovereignty of our States, some of these parts are yielded to Congress. Upon these I should think then (Congress) both legislative and executive, and that they would have been judiciary also, had not the Confederation required them for certain purposes to appoint a judiciary. It has accordingly been the decision of our courts that the Confederation is a part of the law of the land, and superior to the ordinary laws, because it cannot be altered by the legislature of any one state. I doubt whether they are at all a diplomatic assembly." Jefferson's reference is to *Rutgers* v. *Waddington,* as is made plain by Hamilton's remark just quoted as to the efficacy of that decision, which was meant to disabuse Jefferson of his erroneous impressions as to the purport of that decision. Others, also, however, held the same impression apparently,—whether from Jefferson or not. At any rate, on March 21st, 1787, Congress voted resolutions in which they declared: first, that the legislatures of the several states could not of

[30] Hamilton, Works (Lodge's ed.), V, 116, and VII, 198.
[31] Writings (Mem. Ed.) VI, 98.

right pass any acts for construing, limiting, or impeding the operations of, the national treaties which "become in virtue of the confederation, part of the law of the land and are not only independent of the will and power of such legislation but also binding and obligatory on them"; secondly, that all such acts repugnant to any such treaty ought to be forthwith repealed; and thirdly, that such repeal should be in general terms, in order that "the courts of law and equity" in all causes wherein such acts were by their terms operative might decide according to the true meaning and intent of the treaty, said act or acts "to the contrary thereof in anywise notwithstanding." Some three weeks later (April 13th, 1787), Congress embodied these resolutions in a Circular Letter to the various states, in which the following words occur: "Our national Constitution having committed to us the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties remain inviolable * * * when therefore a treaty is constitutionally made, ratified, and published by us, it becomes binding on the whole nation, and superadded to the laws of the land without the intervention of the state legislatures * * *"[32] The importance of the Circular Letter we shall discover in a moment.[33]

In connection with the Constitutional Convention four questions arise: first, did that body in terms confer upon the federal judiciary the power to pass upon the constitutionality of acts of Congress? secondly, if not, did it yet conceive that that power would belong to the judiciary as an item of judicial power? thirdly, with what intention was article 6, paragraph 2, inserted in the Constitution? fourthly, was it the intention of the framers of the Constitution that appeals should lie from the State courts to the United States Supreme Court?

The answer to the first question is an unqualified negative. The only clause of the Constitution ever adduced directly or indirectly as conferring such a power is the phrase, "cases arising under this Constitution" is article 3, section 2, and this is construed by both Hamilton and Madison in the Federalist and by Madison in the Virginia Convention, to signify cases arising under State laws al-

[32] Journals of Congress (Ed. of 1801), XII under dates mentioned.

[33] In this connection, see also Bancroft, History of the Constitution, II, 472; and Harvard Law Review, VII, 415 ffg. It seems evident that Jefferson's correspondent was in error. Madison apparently was uncertain whether the Articles of Confederation, resting as they did upon the ratification of the State Legislatures merely, could be given paramountcy within the States, to the derogation of conflicting State laws. See Elliot, I, 400; also ibid V, 99 and 171. I owe these citations to Coxe.

leged to infringe the Constitution.[34] Any categorical answer to the second question is on the other hand quite impossible. Such discussion on the floor of the Convention as touched upon the possibility of the federal judiciary's having the power to review acts of Congress under the Constitution arose in connection with the proposition embodied in the eighth resolution of Randolph's Plan, to associate the executive and "a convenient number of the national judiciary to compose a council of revision" of acts of Congress. Gerry opposed this proposition: he thought the judiciary would derive a sufficient check against encroachment from their power of deciding upon the constitutionality of laws and he urged the impropriety of giving the judges a hand in making laws upon the constitutionality of which they should have subsequently perhaps to pass in their judicial capacity,—an argument which was reiterated or applauded at various times by King, Martin, Strong, Charles Pinckney, and Rutledge. On the other hand, of those who championed the idea of a council of revision, Madison, Wilson, and Mason accepted explicitly the idea of judicial review but were disposed to minimize the force of Gerry's objection. "There was weight" in it, Wilson thought, "but this power of the judges did not go far enough. Laws might be unjust * * * destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect"; an argument to which Gerry responded to the effect that the "representatives of the people rather than the judges should be the "guardians of their rights and interests."[35] There can be no doubt therefore that the idea of judicial review, within narrow limits, and particularly as a weapon of self defense on the part of the courts against legislative encroachment, had made considerable headway among the membership of the Constitutional Convention. Further than this, moreover, Pinckney and Rutledge of South Carolina foresaw that the federal judiciary would be the "umpire between the United States and the individual States," an idea which is voiced by Madison in the Federalist, and in the State conventions, interestingly enough by two future chief justices of the United States Supreme Court and one associate justice, Ellsworth of Connecticut, Marshall of Virginia, and Wilson of Pennsylvania.[36]

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[34] Federalist, Numbers 44 and 80 (Lodge's edition). Madison's Writings (Hunt's edition), V, 217-18.

[35] Follow the discussion in Madison's Notes, under the dates June 4-6, and July 21; also see Madison's Speech, June 23.

[36] Rutledge, in Madison's Notes, Aug. 27; Pinckney, Aug. 10; Madison, in Federalist No. 39; Wilson, in Elliot's Debates, II, 489; Ellsworth, ibid., pp. 196-7; Marshall, ibid., III, 553; see also Elliot, III, 205, 324, 325.

But this is only one side of the question. The debate over the proposed council of revision also brought out strong expressions of disapprobation of the idea of judicial review. Bedford of Delaware, a strong State's rights man, but also,—and quite logically—a strong believer in legislative power, expressed himself at an early date as "opposed to every check on the legislature, even the council of revision * * * he thought it would be sufficient to mark out in the Constitution its boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments. The representatives of the people were the best judges of what was for their interest and ought to be under no external control whatever."[37] Mercer of Maryland was of the same persuasion: "he disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void," a remark which impressed Dickinson of Delaware strongly. He too "thought no such power ought to exist. He was at the same time at a loss what expedient to substitute * * * Mr. Gouverneur Morris suggested the expedient of an absolute veto in the executive."[38] As the clause "cases under this Constitution" was inserted in the Constitution less than a fortnight later by unanimous vote of the Convention, it seems plain that it was not intended or understood to confer upon the federal judiciary a branch of power which certain members of the Convention were so loath to admit as adhering to the judicial office.[39]

But there is further evidence, either of disbelief or of only vacillating belief in judicial review, on the part of members of the Convention. While the Convention was in session the supreme court of North Carolina, after more than a year's hesitation, pronounced unconstitutional, in the case of *Bayard* v. *Singleton,*[40] an Act of Confiscation dating from the Revolution. The counsel for plaintiff in this action upon whose argument the statute was pronounced void was James Iredell. His argument had, at the time of its first transpiration, created a furor of criticism from the party, composed both of laymen and lawyers—and very strong in North Carolina at this time, as we learn—which had come to adopt the theory of legislative sovereignty. Now that Iredell had won his cause, Richard Dobbs Spaight, a North Carolina member of the Federal

[37] Madison's Notes, June 4.

[38] Ib., Aug. 15.

[39] Ib., Aug. 27. See below.

[40] 1 Martin (N. C.) 42 (47). The decision is further interesting as resting in part upon a recognition by the court of the Articles of Confederation as a "part of the law of the land, unrepealable by any act of the general assembly." This, however, was not the main point upon which the constitutional question turned. See Chapter VI below.

Convention, took up the cudgels for the defeated cause. Spaight's letter to Iredell, which is dated Philadelphia, August 12, 1787, runs in part as follows: "The late determination of the judges at Newbern must in my opinion produce the most serious reflections in the breast of every thinking man, and of every well wisher to his country * * * I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it that I complain of, as I do most positively deny that they have any such power; nor can they find anything in the Constitution, either directly or impliedly, that will support that, or give them any color of right to exercise that authority. Besides it would be absurd and contrary to the practice of all the world, had the convention vested such powers in them * * * and the State, instead of being governed by the representatives in general assembly, * * * subject to the will of three individuals, who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoys. * * * If they possess the power, what check or control would there be to their proceedings, or who would take the same liberty with them that they have taken with the legislature, and declare their opinion to be erroneous?" Iredell's answer of a fortnight later states no new argument for judicial review, but it puts in a single sentence the real reason for it in the minds of its advocates: "In a republican government (as I conceive) *individual liberty* is a matter of the utmost moment, as, if there be no check upon the public passions, it is in the greatest danger."[41]

The great importance of the Constitutional Convention, however, in connection with the development of judicial review, arises from its action in utilizing the idea in solving the problem of federal control over State legislation.[42] Randolph's sixth resolution, taking a page from colonial history, when the mother-country had exercised a similar power over colonial legislation, gave to the national legislature the power "to negative all laws passed by the several states contravening" in its opinion the articles of union, and on May 31, the Convention, sitting in committee of the whole, agreed to this proposition without debate. On June 8, Charles Pinckney went a step farther, moving "that the national legislature should have authority to negative all laws which they should judge to be improper." Madison, instancing "the constant tendency in the states" "to oppress the weaker party within their respective jurisdictions"

[41] McRee, Life and Correspondence of James Iredell, II, 169-76; see also ibid. pp. 145-49.

[42] Follow the discussion in Madison's Notes, under the dates furnished in the text.

and urging the necessity in the general government of a prerogative to "control the centrifugal tendency of the States," seconded the motion. Wilson too championed the idea: of course the States would object to such control, "federal liberty being to them what civil liberty is to private individuals; and as the savage is unwilling to purchase civil liberty by the surrender of his personal sovereignty in a state of nature, so would the States be unwilling to yield their political sovereignty"; but an effectual control in the whole over its parts had become a necessity. Dickinson of Delaware also was favorable, and possibly the notion would have gone farther had not Dickinson's colleague Bedford begun to point out some objections to its practicability which caused even Madison's enthusiasm to wane. A vote being taken, only Massachusetts, Virginia, and Pennsylvania were affirmative. On June 15, Patterson introduced the "small State plan," the sixth resolution of which, obviously traceable to the Circular Letter of Congress of the previous April, provided that "all acts of the United States in Congress made by virtue of and in pursuance of the powers hereby * * * vested in them and all treaties made or ratified under the authority of the United States shall be the supreme law of the respective states, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding." Three days later Hamilton offered his plan, article 10 of which provided that all State laws contrary either to national laws or to the national constitution should be utterly void, and vested the state governors, who were to be appointed by the general government, with the veto power over State laws.

The question of the national veto came up again July 17th, in connection with the report of the committee of the whole. Morris opposed this power, even within the limits set to it in that report, "as likely to be terrible to the States." It was Sherman however who made the greatest contribution to the discussion. Such a power he thought unnecessary: "the courts of the States would not consider valid any law contravening the authority of the union." Madison was not easily convinced: "Confidence," he said, "cannot be put in the State tribunals as guardians of the national authority and interest. In all the States there are more or less dependent on the legislatures. In Rhode Island the judges who refused to execute an unconstitutional law were displaced and others substituted by the legislature, who would be the willing instruments of the wicked and arbitrary plans of their masters." Sherman reiterated

his point: "such a power [of veto] involves a wrong principle, to-wit, that a law of a State contrary to the Articles of Union would, if not negatived, be valid and operative." The veto was thereupon voted down three to seven. The proposition embodied in the Paterson plan was then moved by Luther Martin and adopted without a dissenting vote. On August 23rd, on motion of Rutledge of South Carolina, who had opposed the federal veto throughout, the Paterson proposition was given essentially its final form by the insertion of the term "this Constitution," meaning the Constitution of the United States, and the term, "the constituion," meaning he constitution of any State.

But the advocates of a national veto were still dissatisfied; and immediately following the adoption of Rutledge's motion, Pinckney again offered the rejected proposition in a somewhat mitigated form. The usual arguments were forthcoming against the idea; but Wilson urged convincingly that "the firmness of the judges," meaning the State judges, "is not of itself sufficient, something further is requisite." On the motion for comitment the vote stood five to six. Pinckney then withdrew his motion but evidently the sentiment for "something further" was growing. Finally on August 27th, Dr. Johnson of Connecticut, "moved to insert the words 'this Constitution and' before the word 'laws'," in the judiciary article of the report of the committee of detail. The motion "was agreed to *nem. con.*, it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature." Already on the 22nd the Convention had begun the task of formulating specific limitations upon State legislation.[43]

It is at this point that my last question becomes pertinent, namely, was it the intention of the framers that appeals should lie from the highest State courts to the United States Supreme Court, or more precisely, that they should lie from the highest State court to the United States Supreme Court in cases "arising under this Constitution"? Subsequently it was denied that this could have been the case, on the ground, essentially, that such appeals derogated from the sovereignty of the States and from that equality within their sphere which, by the theory of the federal system, they enjoy with the national government. For by this theory, it was argued, Congress must treat the courts of the States as those of coordinate sovereignties and not attempt to vest the national courts with coercive powers over them. The theoretical strength of this

[43] Brinton Coxe arrives at the conclusion, inadmissible as I have shown, that the Constitution confers the power of review of acts of Congress upon the national judiciary. See Coxe, pp. 336-42.

argument we shall be able to estimate a little farther on, but historically it had no ground to stand upon. On June 4th, the Convention had taken up the first clause of Randolph's ninth resolution, providing for a national judiciary "to consist of one or more supreme tribunals and of inferior tribunals" and the clause had been adopted unanimously. Next day however Rutledge had moved reconsideration on the ground that the "State tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the national tribunal being sufficient to secure national rights and uniformity of judgment." Sherman had seconded the motion while Madison had objected to it, because of his fears of the "biased directions of a dependent judge or local prejudice of an undirected jury." Dickinson and Wilson had been with Madison. Nevertheless Rutledge's motion had carried six to four, a plain triumph for the States Rights party. Wilson and Madison had then moved, conformably with an idea dropped by Dickinson, that "the national legislature be empowered to institute inferior tribunals" and this motion, leaving the matter to the discretion of Congress, had been carried by a vote of eight to two, only South Carolina and Connecticut voting in the negative. Finally on July 18th, the Convention had adopted this recommendation from the committee of the whole unanimously, Sherman of Connecticut remarking that he "was willing to give the power to the legislature but wished them to make use of the State tribunals whenever it could be done with safety to the general interests."[44]

Nothing could be plainer than the purport of this discussion and of these votes, namely that jurisdiction in the first instance of causes of this kind specified in the Constitution of the United States, with subsequent appeal to the United States Supreme Court, was the maximum concession that was demanded in the Convention by the Pro-State party. The evidence of the discussion attending upon the ratification of the Constitution is to the same effect. A principal argument against the Constitution was that the naional judiciary would swallow up the State judiciaries and the clause of the Constitution investing the judicial power of the United States "in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish" was construed in support of this argument to signify "that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend." In Federalist 82 Hamilton attacks this construction as affecting an "alienation of the State pow-

[44] For a somewhat fuller discussion of this topic, see Coxe, pp. 342-48.

er by implication" and offers the alternative construction, denoting simply, "that the organs of the national judiciary shall be one supreme court and as many subordinate courts as Congress shall think fit to establish." Thus the State courts are left "their primitive jurisdiction" unimpaired, save that they exercise a portion of it concurrently with the federal judiciary, but, Hamilton proceeds, the necessary consequence of participation by the State courts in the national jurisdiction is that appeals shall lie from those courts to the United States Supreme Court." "The Constitution in direct terms," he contends, "gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine this operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated." Furthermore to deny such appeal would subvert the most serious purposes of the national judicial power.

The judicial power of the United States was set in operation by the Judiciary Act of 1789.[45] By the logic of the act, as by that of Art. III of the Constitution, this power falls into two great classes of cases: those over which jurisdiction is conferred on the United States because of the nature of the questions involved, for example "cases arising under the Constitution"; and those over which jurisdiction is conferred because of the character of the parties interested, for example cases between citizens of different States. Cases of the first class were left by the act to originate in the State tribunals, while by the 25th section appeal was provided to the United States Supreme Court on three occasions: namely, first, where "is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity"; secondly, "where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity"; and "thirdly, where is drawn in question the construction of any clause in the Constitution or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission." In such cases it was provided that the decision of the highest State court might be "reexamined and reversed or affirmed in the Supreme Court of the United States

[45] Statutes at Large of the U. S. (Little & Brown, 1856), I, 73 ffg.

upon a writ of error, the citation being signed by the Chief Justice or judge or chancellor of the court rendering * * * the decree complained of, or by a justice of the Supreme Court of the United States." As is obvious, it is the second class of cases over which jurisdiction was conferred upon the United States in the interest of providing an impartial tribunal. By the Act of 1789 accordingly original jurisdiction in this class of cases, where the matter in dispute should be above $500, was vested in the federal circuit courts concurrently with the State courts, while by the 11th section of the act provision was made for the removal of such causes from the State to the national courts upon petition of defendant. In the debate pending its passage the act was criticized by the Pro-State party almost exclusively for its provision of an inferior federal judicature. Except a few admiralty and prize courts, this party urged, the purposes of the Constitution would be amply met by leaving the national jurisdiction to the State courts in the first instance, with an appeal in each case to the United States Supreme Court; and one spokesman of this party, Jackson of Georgia, pointed explicitly to the 11th and 25th sections of the act as harmonizing with this notion.[46] Yet it was this very 25th section which the States Rights party was, some twenty-five years later, to attack as particularly reprehensible from a constitutional point of view.

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PRINCETON, NEW JERSEY.

[46] For the debate in the House, which alone is reported outside McClay's Journal, see the Annals of Congress, I, 826-66. For Jackson's speech, see ibid. pp. 845-6.

(To be concluded.)